No. 83-50

In the Supreme Court of the United States

OCTOBER TERM, 1983

GROLIER, INCORPORATED, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHN H. CARLEY
General Counsel

HOWARD E. SHAPIRO
Deputy General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel

MELVIN H. ORLANS
Attorney

Federal Trade Commission
Washington, D.C. 20580

QUESTIONS PRESENTED

1. Whether the pattern of deliberate and repeated deceptive practices found by the Federal Trade Commission on this record warranted the Commission's conclusion that requiring petitioners to make certain disclosures in their advertisements and at-home solicitations is necessary to remedy those practices and prevent their recurrence.

2. Whether the Commission's Administrative Law Judge should have been disqualified because he had previously served as an attorney-advisor to a Commissioner, even though he had never been exposed to any factual information about the case in his prior position, or participated in any way in its investigation or prosecution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Page

Cases—Continued:

Page

Constitution, statutes and regulations:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-50

GROLIER INCORPORATED, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 699 F.2d 983.[1] The Final Order of the Federal Trade Commission (Pet. App. B1-B22) is reported at 99 F.T.C. 379. The Commission's Order Modifying Cease and Desist Order (Pet. App. D1-D6) is reported at 98 F.T.C. 882. The Commission's Order Denying Motion to Disqualify Judge von Brand (Pet. App. F1-F15) is reported at 98 F.T.C. 115.[2] The opinion of the Federal Trade Commission (Pet. App. E1-E15) is reported at 91 F.T.C. 476. The initial

---

[1]An earlier opinion of the court of appeals (Pet. App. C1-C12) is reported at 615 F.2d 1215.

[2]The Commission's initial order on Judge von Brand's disqualification is reported at 87 F.T.C. 179 (1976).

decision of the Administrative Law Judge is reported at 91 F.T.C. 315.[3]

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1983 and amended on March 2, 1983. A petition for rehearing was denied on April 11, 1983 (Pet. App. G1). The petition for a writ of certiorari was filed on July 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the First and Fifth Amendments to the Constitution, Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. V) 45, and the Administrative Procedure Act, 5 U.S.C. 554(d), are set forth at Pet. 2-3.

STATEMENT

1. Petitioners Grolier, Inc. and its wholly-owned subsidiaries ("Grolier") publish and distribute encyclopedias, other reference works and services, training courses, and teaching machines. Their products, which have included *Encyclopedia Americana*, *Encyclopedia International*, *New Book of Knowledge*, *World's Greatest Classics*, *Book of Popular Science*, and *Children's Hour*, are sold door-to-door and by mail solicitations (Pet. App. E1-E2).

To gain entry into a potential customer's home and to overcome resistance to door-to-door sales solicitations, petitioners trained and directed their salespersons not to mention encyclopedias at the door, to avoid using the word "sale" during the presentation, and affirmatively to misrepresent the actual purpose of their visits. For example,

---

[3]Petitioners have not reproduced the initial decision, although its detailed findings and conclusions were, with a few exceptions, adopted by the Commission. Cf. Rule 21(k)(ii) of this Court's Rules.

petitioners instructed their salespeople to characterize the visit as an interview, survey, or club enrollment and, if questioned, to deny any intent to solicit sales. Petitioners' sales representatives falsely stated that the visit, whether characterized as a survey, interview, or awarding of prize certificates, would take only a few minutes of the consumer's time, thus reinforcing the misrepresentations about the purpose of the visit (91 F.T.C. at 370-381).

Petitioners also used various alleged contests and other misleading promotions to obtain leads for potential sales. For example, through advertisements in nationally circulated magazines, they offered to send free booklets to consumers. But none of these advertisements disclosed that those responding would be contacted by salespersons. After the booklets were mailed, sales representatives contacted the recipients to set up appointments for standardized sales presentations. Another device involved false "drawings" for free vacations. All entrants who qualified as prospective customers were informed by telephone that they had won a free vacation, but that their vacation certificate would be awarded at a personal appointment. No drawing had been held, however; the real purpose for soliciting entrants was to identify prospective purchasers (91 F.T.C. at 368-370).

In still another approach, petitioners contacted parochial schools by claiming affiliation with educational groups or associations. On the pretext of taking a poll or developing interest in federal support for use of petitioners' educational programs by the schools, they obtained lists of parents' names. Petitioners then distributed materials, including response cards, to the parents, but mailed in such a manner that the packet appeared to have originated with the school or diocese. Sales staff thereafter contacted parents who returned the cards to arrange "free demonstrations" which in fact were sales presentations (91 F.T.C. at 363-368). In

addition, petitioners employed numerous other deceptive sales practices, including deceptive offers of merchandise at reduced prices in exchange for "cooperation" (*id.* at 377), misleading retail list prices to aid "discount sales" (*id.* at 381), and misrepresentation of financial terms and endorsements (*id.* at 376-406).

Petitioners also used deceptive practices to recruit sales people. They often placed "blind" advertisements that did not disclose the nature of the position, the company name, or the product involved. These ads frequently contained misleading salary or income guarantees. In other instances, petitioners' ads falsely claimed that the positions did not involve sales, and misrepresented sales jobs as involving public relations, interviewing and opinion polling, advertising work, managerial training and the like. When interested persons contacted Grolier, petitioners scheduled personal interviews, but no additional information was disclosed over the telephone regarding the true nature of the employment. The deception often continued into the interview and hiring process, misleading many applicants through the initial interview (91 F.T.C. at 350-361).

Petitioners' debt collection and mail order procedures also involved deliberate false, misleading and deceptive practices (91 F.T.C. at 407-424).

2. On March 9, 1972, the Federal Trade Commission ("FTC") issued an administrative complaint alleging that Grolier's sales and recruiting practices were unlawful under Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. V) 45. The Administrative Law Judge ("ALJ") initially assigned to the case presided through the pretrial stages and continued with the evidentiary hearings until his retirement early in 1975. He was succeeded by ALJ Theodor P. von Brand, who held his first prehearing conference on March 19, 1975. At Grolier's insistence, he ultimately

reheard much of the testimony. Almost a year later, and just five days before the end of the hearings, Grolier's president testified that in 1966 or 1967 he had attended a meeting at which Commissioner MacIntyre was present. Judge von Brand immediately stated that he had been an attorney-adviser to Commissioner MacIntyre from 1963 until January 1971, but had no recollection of any matters involving Grolier (Pet. App. F3).

Judge von Brand denied Grolier's subsequent request that he disqualify himself. Grolier claimed that his participation as an administrative law judge violated the separation of functions provisions in the Administrative Procedure Act, 5 U.S.C. 554(d). That statute bars employees who perform investigative or prosecuting functions in any case from participating or advising in the agency's decision. Grolier also claimed that von Brand's participation created the appearance of impropriety, and demanded document discovery. Judge von Brand stated on the record that his past service as an attorney-adviser had been publicly disclosed when he became an ALJ in March 1975, that he had no recollection of ever working on Grolier matters, and that a search of Commissioner MacIntyre's files and of his own files had disclosed nothing related to Grolier. *Grolier Inc.*, 87 F.T.C. 179 (1976).

The Commission declined to disqualify the ALJ, holding that legal advisers to Commissioners are essentially like law clerks, and act in an advisory rather than in an investigative or prosecutorial role. Discovery, it held, was therefore unwarranted as a matter of law (*ibid.*).

Grolier then incorporated its discovery demands into a request under the Freedom of Information Act, 5 U.S.C. 552. It received most of the documents requested on June

28, 1976. Ultimately, all of the Commission documents Grolier sought were disclosed (Pet. App. F4-F5).[4]

3. Meanwhile, on October 12, 1976, ALJ von Brand issued his initial decision finding extensive and deliberate violations of Section 5 of the Federal Trade Commission Act (91 F.T.C. at 331). On Grolier's appeal, the Commission adopted substantially all of the ALJ's findings on liability, modified his proposed order, and reconfirmed its earlier rejection of Grolier's disqualification arguments (Pet. App. E1-E15).

The Commission found that petitioners' solicitation methods affirmatively misrepresented the real purpose of in-home visits, which was to sell the company's products. It therefore required that when seeking admission to a home or business to solicit sales, petitioners' representatives present a card setting forth in large type the name of the sales person, the name of the corporation, the term "Encyclopedia Sales Representative," and disclosing that "the purpose of this representative's call is to solicit the sale of encyclopedias (Pet. App. E5; A7).

To remedy petitioners' deceptive lead-gathering techniques, the Commissioner required Grolier to inform consumers that their responses to contests and promotions may result in a visit by a sales representative. The Commission subsequently permitted any of three similar formats for this

---

[4]Grolier sued under the Freedom of Information Act for disclosure of the remaining documents. *Grolier, Inc.* v. *FTC*, 1978-1 Trade Cas. (CCH) para. 62,084 at 74719 (Mar. 10, 1978). After ordering a further search that produced nothing, the district court ruled that the withheld documents were exempt from mandatory disclosure. Grolier's appeal from this decision was dismissed after the Commission, on March 10, 1981, released the 28 documents still in contention (Pet. App. F4-F6). Petitioners thus obtained, *inter alia*, every document relating to Grolier that circulated among the Commissioners while von Brand served as an attorney-adviser (*id.* at F7).

disclosure, and provided that, with Commission approval, petitioners could use any other disclosure that clearly and conspicuously indicates that responding consumers may be contacted by sales people (*id.* at B4-B5, D1-D4).[5]

Finally, to remedy petitioners' deceptive recruitment practices, the Commission required them to disclose in advertising that [they are] recruiting encyclopedia salesmen (Pet. App. E4).

4. On Grolier's first petition for review (*Grolier I*), the court of appeals (Pet. App. C1-C12) found it unnecessary to reach any issue except the Commission's refusal to allow discovery concerning the ALJ's possible role in the case as an attorney-adviser. The court rejected the FTC's view that a Commissioner's legal assistant has no investigative or prosecutive role. It held that under 5 U.S.C. 554(d), such an assistant must be deemed to have performed an investigative or prosecuting function if, in his capacity as an adviser to a Commissioner, he became acquainted with *ex parte* information. It excepted from this holding actively serving attorney-advisers, "who must counsel the member at both the investigative and decision-making stages of a case" (Pet. App. C8). While this exception would not apply to ALJ von Brand, who is no longer an attorney-adviser, the court nevertheless rejected Grolier's claim that the ALJ was disqualified *per se* by virtue of his former position. In the court's view, the issue under 5 U.S.C. 554(d), is one of fact: whether, while an attorney-adviser, von Brand had actually been apprised of *ex parte* information about Grolier (Pet. App. C9-C10). Because the Commission had flatly denied discovery on a ground the court viewed as legally

---

[5]The subsequent changes in the original order were intended to conform it with the modified order in *In re Encyclopaedia Britannica*, 96 F.T.C. 778 (1980). See Pet. App. D1.

erroneous, it remanded for reconsideration of the disqualification (*id.* at C11). The Commission was not automatically required to grant discovery, but only to "produce sufficient information to permit it and a reviewing court to make an accurate 554(d) determination" (*ibid.*).

5. On remand, ALJ von Brand submitted an affidavit confirming his prior statements that he could not recall ever having worked on Grolier matters as an attorney-adviser; that conversations with Commissioner MacIntyre and his secretary showed that another attorney-adviser had done so; and that searches of his own records, Commissioner MacIntyre's records and the Commission's records had disclosed nothing connecting him with the Grolier case (Pet. App. F5).

Commissioner MacIntyre also filed an affidavit explaining that under his compartmentalized assignment procedure, von Brand worked only on cases in an adjudicatory status, and did not work on investigative matters; that he could not recall ever discussing Grolier with von Brand; and that he was unaware of any contact by von Brand with Grolier matters while an attorney-adviser (*id.* at F5-F6).

In addition, the Commission noted that Grolier had in fact obtained extensive disclosure, including every pre-complaint document circulated among the Commissioners (see page 6 note 4, *supra.*) Not one document connected von Brand with the Grolier matter during his employment as an adviser (Pet. App. F6-F7).

6. On Grolier's second petition for review (*Grolier II*) the court of appeals affirmed and enforced the Commission's order (Pet. App. A1-A9). It found that the evidence before the Commission on the disqualification issue, and the extensive document disclosure made by the Commission (*id.* at A3, n.3) "adequately show that the ALJ was not involved in the Grolier investigation" (Pet. App. A4). It

concluded that Grolier's further demands for discovery were "a pure fishing expedition" seeking "to return this marathon proceeding to square one to further delay imposition of the FTC's cease and desist order" (*id.* at A4).[6]

Grolier did not challenge the Commission's findings on liability. It contended instead that the remedial provisions in the Commission's order violated the First Amendment's protections for commercial speech because they were broader than necessary. The court of appeals disagreed, holding that the First Amendment does not protect unlawful or misleading speech and that the Commission's order was properly and reasonably related to the illegal trade practices it sought to remedy (*id.* at A5-A8).

Judge Poole dissented from the Court's holding on the disqualification issue. He would have allowed Grolier to depose Judge von Brand (*id.* at A9).

ARGUMENT

Petitioners' challenges to the remedies in the Commission's order, and to the Commission's refusal to disqualify the ALJ, were fully considered and correctly resolved by the Commission and the court of appeals. These rulings are consistent with the decisions of this Court and of other courts of appeals. Accordingly, further review is not warranted.

1. Petitioners concede that, consistent with the First Amendment, the Commission may prohibit misleading commercial speech and remedy it by requiring affirmative disclosures "reasonably necessary" to prevent deception

---

[6]The Commission's remedial order, originally entered March 13, 1978, and modified August 13, 1981, will not become operative until all review is completed. 15 U.S.C. 45(g).

(Pet. 10, 12).[7] They ask only that this Court review their claim that the specific remedies the Commission adopted in this case violate the First Amendment because the disclosures required are broader than "reasonably necessary." Determining what is "reasonably necessary" to correct misleading and deceptive speech, however, requires purely factual inquiries into the deceptive practices, the propensities of the malefactor, and the extent to which particular remedies will work. The latter question implicates as well the expert remedial knowledge and experience of the agency.[8]

Thus, when seeking to remedy misleading advertising the Commission may constitutionally "require that a commercial message appear in such a form * * * as [is] necessary to prevent its being deceptive." *Friedman* v. *Rogers*, 440 U.S. 1, 10, 16 (1979), quoting *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976). See, *e.g.*, *Bates* v. *State Bar*, 433 U.S. 350, 383-384 (1977). Use of affirmative disclosure requirements to assure truthful advertising of the kind involved in this case is a recognized and, indeed, a preferred remedial technique. See *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Bates* v. *State Bar, supra*, 433 U.S. at 375. So long as the remedy is "reasonably necessary to prevent the deception," such requirements do not contravene the First Amendment. *In re R.M.J., supra*, 455 U.S. at 203. See *Friedman* v. *Rogers, supra*, 440 U.S. at 10, 16.

---

[7] *Bolger* v. *Youngs Drug Products Corp.*, No. 81-1590 (June 24, 1983), slip op. 4-5; *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 561-563 (1980); *Friedman* v. *Rogers*, 440 U.S. 1, 9-11 & n.9 (1979); *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 455-456 (1978).

[8] *FTC* v. *Standard Education Society*, 302 U.S. 112, 120 (1937); *FTC* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392-393 (1959); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965).

The Commission and the court of appeals correctly resolved the complex factual and remedial issues presented by the "reasonably necessary" test. Significantly, the remedies initially imposed in this case are identical to those initially imposed in *In re Encyclopaedia Britannica, Inc.*, 87 F.T.C. 421 (1976), aff'd, 605 F.2d 964 (7th Cir. 1979) cert. denied, 445 U.S. 934, modified, 96 F.T.C. 778 (1980), 100 F.T.C. 500 (1982).[9] That case involved essentially similar misconduct. The court in *Britannica* noted (605 F.2d at 973) the Commission's finding that the remedies were "required to prevent future deception" and rejected the company's argument that such a remedy was not "the least restrictive alternative which will adequately further the legitimate governmental interest in the prevention of deception."

The Commission's findings, no longer contested, reflect this approach. It determined that petitioners' deceptive sales practices were pervasive, deliberate, and continuing. Most of these deceptive practices occurred during in-home solicitations, which may be more strictly regulated than other forms of speech under the First Amendment because consumers are especially vulnerable in such confrontations. See *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 449, 457-458 (1978). Furthermore, petitioners were well aware that the kinds of deceptions at issue here, a persistent

---

[9]The Commission subsequently modified the remedies in this case (Pet. App. D1-D6) to conform to certain modifications it granted after the denial of certiorari in *Encyclopedia Britannica, supra*, but it declined to allow Grolier certain other specific modifications that had been granted to Encyclopedia Britannica because of that company's compliance experience. See page 7 note 5, *supra*. As the FTC noted (Pet. App. D2), Grolier lacks similar compliance experience.

problem in the door-to-door retailing of encyclopedias,[10] have long been condemned: Grolier units have repeatedly been censured for such misconduct.[11]

To prevent recurrence of these deceptions, the Commission required petitioners to: (1) apprise potential customers of the true purpose and identity of petitioners' salespersons; (2) disclose in their lead-gathering materials that persons who respond may be contacted by petitioners' salespersons; and (3) reveal in their recruitment advertising and at the interview the nature of the job offered and the

---

[10]See, *e.g.*, *FTC* v. *Standard Education Society, supra*, 302 U.S. at 113-118; *Encyclopaedia Britannica, Inc.* v. *FTC*, 605 F.2d 964, 966-970 (7th Cir. 1979), cert. denied, 445 U.S. 934 (1980); *In re Crowell-Collier Publishing Co.*, 70 F.T.C. 977, 1010-1013, 1021-1026 (1966); *In re Encyclopaedia Britannica, Inc.*, 59 F.T.C. 24, 34-38 (1961); *In re Basic Books, Inc.*, 56 F.T.C. 69, 79-80 (1959); *In re National Educators, Inc.*, 49 F.T.C. 1358, 1362-1363 (1953); *In re Encyclopeadia Britannia, Inc.*, 48 F.T.C. 1416, 1425-1427 (1952); *In re National Surveys and Education Development Co.*, 47 F.T.C. 888, 894-895 (1951); *In re Americana Corp.*, 45 F.T.C. 32, 43-44 (1948); *In re General Surveys, Inc.*, 34 F.T.C. 1157, 1162-1163 (1942); *In re Holst Publishing Co.*, 24 F.T.C. 404, 414-415 (1937); *In re World Library Guild, Inc.*, 23 F.T.C. 598, 604-606 (1936); *In re American Academic Research Society*, 17 F.T.C. 419, 420-421 (1933); *In re Consolidated Book Publishers, Inc.*, 14 F.T.C. 13, 18-19 (1930).

[11]A cease and desist order was entered against Americana Corp., one of Grolier's subsidiaries and a petitioner here, in 1948. See *In re Americana Corp.*, 45 F.T.C. 32, 47-48 (1948), modified, 46 F.T.C. 253 (1949). This order proscribed some of the practices used in the present case, including representations by salespersons that they were something other than salespersons. 46 F.T.C. at 254. Two civil penalty actions have been brought for violations of this order, and Americana Corp. has been required to pay $118,000 in civil penalties (Tr. 15447-15449). In 1964, the Commission accepted a consent order against Grolier Enterprises, Inc., another petitioner. See *Grolier Enterprises, Inc.*, 65 F.T.C. 901 (1964). In 1966, the Commission issued a proposed complaint challenging several recruiting practices and misrepresentations that were challenged here. Grolier executed an Assurance of Voluntary Compliance in 1967 to forestall further legal action by the Commission at that time (C.A. App. 5536-5561).

basis for compensation. In mandating each of these provisions, the Commission carefully evaluated the surrounding circumstances and explicitly found in each instance that the provision in question was necessary to prevent deception.[12]

The court of appeals scrutinized each provision in the context of the Commission's findings in order to determine the reasonableness of the order in remedying "the illegal trade practices the [Commission] seeks to prevent" (Pet. App. A7). The court expressly found that the Commission's findings were supported by substantial evidence (Pet. App. A9). For example, the court sustained the "card-at-the-door" requirement because "[a]ny less stringent disclosure

---

[12]In considering the "card-at-the-door" requirement, the Commission assessed both the need to order exact disclosures and the size of the card. It concluded that "[e]ach of the disclosures required to be included on the card * * * is necessary to prevent future violations," and that the size of the card was necessary as well (Pet. App. E7-E8). With respect to the disclosure (that a salesperson may call) required in lead-gathering materials, the Commission held that this requirement was needed to remedy the deceptive non-disclosure of this material fact (Pet. App. E8). The Commission also found that:

> [I]t is necessary to place this important language in ten point bold face to assure that the consumer will be apprised of the message. The proposed language includes a disclosure that the consumer may be contacted by a sales representative for the purpose of selling the applicable product. There is no question that the main purpose of respondent's sales representatives in contacting persons at their homes is to sell its products. Any other assertion or inference would be deceptive.

(Pet. App. E9). Finally, in connection with petitioners' deceptive recruitment practices, the Commission found:

> Under these circumstances, the order provision requiring respondent to disclose in advertising that it is recruiting "encyclopedia salesmen" is necessary to prevent a continuation of the type of deception which has misled job applicants in the past.

(Pet. App. E4). Thus, petitioners' contention (Pet. 12) that the "reasonably necessary" test was not applied in this case is baselsss.

requirement would be difficult to enforce and might allow Grolier to continue its deceptive practices" (*id.* at A7).

Both the Commission and the court of appeals correctly applied the "reasonably necessary" test, and concluded that on this record, the specific remedies adopted were necessary to correct and prevent Grolier's misrepresentations. There is, therefore, no conflict with any of the cases cited by petitioner (Pet. 12-14) applying to particular facts the well established rule that the Commission's remedies can "go no further then * * * to prevent future deception" (*id.* at 14).

2. The court of appeals has twice considered whether ALJ von Brand should have been disqualified. Whatever the soundness of the decision in *Grolier I*,[13] the Commission faithfully complied with the mandate to determine whether, in fact, von Brand obtained any *ex parte* information about the *Grolier* case while serving as a legal assistant to Commissioner MacIntyre. Although petitioners appear to disagree with the decision of the Commission and the court in *Grolier II* that no further discovery is necessary (Pet. App. A3, A4, F6, F8),[14] they do not seek review on this issue. Instead, they ask the Court to disqualify the ALJ under 5 U.S.C. 554(d) and the Due Process Clause on a novel *per se* theory: that he "should be charged with participation in the investigation or prosecution of petitioners during his tenure

---

[13]Some commentators have suggested that the *Grolier I* standard—which was met here—may be unduly stringent. See 3 K. Davis, *Administrative Law Treatise* § 18.5, at 359 (2d ed. 1980); Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Colum. L. Rev. 759, 771-772 (1981).

[14]Grolier, which never utilized the extensive documentation it obtained under FOIA in its discovery arguments to the Commission and the court of appeals (Pet. App. F5), ultimately received every document it sought. Not one linked von Brand to any *ex parte* information about Grolier, and sworn statements by him and former Commissioner MacIntyre showed that no such link existed. See page 8, *supra*.

as attorney-adviser because his commissioner had so participated" (Pet. 17). Thus, having failed on remand to bear the burden of proving actual participation, petitioners now belatedly ask this Court to consider the per se disqualification rule rejected in *Grolier I* (Pet. App. C9-C10).

There is no basis in law for this standard. First, the "actual involvement" standard announced in *Grolier I* (Pet. App. C9, C10) accords with the plain language of 5 U.S.C. 554(d). That statute provides that "[a]n employee or agent *engaged* in the performance of investigative or prosecuting functions for an agency * * * may not, in that or a factually related case, participate or advise in the decision * * *" (emphasis added). It follows, as the court of appeals held in *Grolier I* (Pet. App. C9-C10), that investigative and prosecuting personnel "are precluded only from participating in the adjudication of cases in which they have actually performed such [investigative and prosecuting] functions, and in 'factually related cases'."

Second, this conclusion accords with the decisions of all other courts that have considered the matter. See, *e.g.*, *Au Yi Lau* v. *INS*, 555 F.2d 1036, 1043 (D.C. Cir. 1977); *Cisternas-Estay* v. *INS*, 531 F.2d 155, 158, 160-161 (3d Cir.), cert. denied, 429 U.S. 853 (1976); *Twigger* v. *Schultz*, 484 F.2d 856, 858, 861 (3d Cir. 1973); *San Francisco Mining Exchange* v. *SEC*, 378 F.2d 162, 170 (9th Cir. 1967); *R.A. Holman & Co.* v. *SEC*, 366 F.2d 446, 452-453 (2d Cir. 1966), modified on other grounds, 377 F.2d 665, cert. denied, 389 U.S. 991 (1967).[15] The Commission thus correctly held (Pet. App. F7) that actual involvement, not what "might have" happened, is the controlling test.

---

[15]Petitioners' reliance on *Amos Treat & Co.* v. *SEC*, 306 F.2d 260 (D.C. Cir. 1962), and *American General Insurance Co.* v. *FTC*, 589 F.2d 462 (9th Cir. 1979), is misplaced. In *Amos Treat*, it was undisputed

This practical requirement arises from the nature of the administrative process itself, which, as *Grolier I* recognizes, contemplates that agency members and their advisers may participate both in evaluating pre-complaint investigations and in deciding post-complaint adjudications (Pet. 8). 5 U.S.C. 554(d)(C). This Court has held that exposure of a decisionmaker to investigative facts does not automatically mandate disqualification or create a presumption of bias. See *Withrow* v. *Larkin*, 421 U.S. 35, 47, 50 n.16, 52-53, 55 (1975) (exposure to evidence presented in non-adversary investigation insufficient to impugn the fairness of the Board members at later adversary hearing); accord *Hortonville Joint School District No. 1* v. *Hortonville Education Association*, 426 U.S. 482, 493 (1976); *Consolo* v. *FMC*, 383 U.S. 607, 626 n.27 (1966);[16] *FTC* v. *Cement Institute*, 333 U.S. 683, 700-703 (1948).

In each case, the burden of proving actual disqualifying facts falls on the party challenging the adjudicator's participation. *Schweiker* v. *McClure*, 456 U.S. 188, 196 (1982); *R.A. Holman & Co.* v. *SEC, supra*, 366 F.2d at 454; *SEC* v. *R.A. Holman & Co.*, 323 F.2d 284, 287 (D.C. Cir. 1963). There is, moreover, a strong presumption that ALJs and other adjudicatory officials will be objective and unbiased. *Schweiker* v. *McClure, supra*, 456 U.S. at 195; *Withrow* v. *Larkin, supra*, 421 U.S. at 47.

---

that a member of the Commission hearing the case had actually participated in the investigation of the Treat firm before he was a Commissioner. 306 F.2d at 262, 265, 266. Similarly, in *American General Insurance Co.*, the court held that the challenged FTC Commissioner had actually participated in the case by appearing as counsel before the Ninth Circuit and signing a brief. 589 F.2d at 463.

[16]In *Consolo*, a party challenged agency counsel's participation in the writing of a decision after having represented the FMC in the court of appeals during an earlier appeal in the same case. This Court "examined [the] contention * * * and [found] it without merit." But see *American General Insurance Co.* v. *FTC, supra*.

To make the mere possibility of exposure to investigative facts sufficient for disqualification would add to 5 U.S.C. 554(d) a standard that is far more rigorous, and far more removed from reality, than Congress thought necessary. The separation-of-functions provision in the Administrative Procedure Act was a careful balancing of appearances and reality. It was designed to exclude those who had developed a partisan view from off-the-record participation in administrative decision-making. *Attorney General's Manual on the Administrative Procedure Act* 57 (1947). This balance struck by Congress in defining the limits of administrative procedures should be supplemented by judicial implication only where due process demands it. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543-545 (1978).

Due process under the Fifth Amendment excludes "generalized assumptions of possible interest" that lack a record basis for inferring bias or an interest in the outcome of a case. *Schweiker* v. *McClure, supra*, 456 U.S. at 196 (hearing officers who adjudicate Part B medicare insurance claims are not disqualified because they are insurance carrier employees). No such basis can reasonably be said to exist where a hearing officer, who previously served as a Commissioner's adviser, might have been exposed to investigative reports but cannot recall ever having seen them, and there is no evidence whatever pointing to a different conclusion.[17]

---

[17]Petitioners are mistaken in their reliance on former Chairman Engman's statements concerning the constructive knowledge of former attorney-advisers and the Commission's refusal to grant clearance to a former attorney-adviser to represent a party before the Commission. The Fifth Circuit, like the court in this case (Pet. App. C9), has rejected the view that an attorney-adviser is chargeable with the same insider knowledge chargeable to his Commissioner. *Gibson* v. *FTC*, 682 F.2d 554, 567 (1982), cert. denied, No. 82-972 (Apr. 4, 1983). Moreover, the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JOHN H. CARLEY
General Counsel

HOWARD E. SHAPIRO
Deputy General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel

MELVIN H. ORLANS
Attorney

Federal Trade Commission

SEPTEMBER 1983

Commission's clearance rules are concerned with a different issue—the appearance of unfairness that may arise from access to "inside information"; disqualification of a hearing officer rests instead on the possibility of partisan bias or prejudgment. *In re Kroger Co.*, 93 F.T.C. 220 (1979).

DOJ-1983-09